

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 12**

MITSUBISHI HITACHI POWER SYSTEMS
AMERICAS, INC.

and

Case No. 12-CA-188952

MOHAMED SHAHAT, an Individual

RESPONDENT'S POST-HEARING BRIEF

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Mitsubishi Hitachi Power Systems Americas, Inc. ("Respondent" or "Company") submits this brief in opposition to the Complaint issued by General Counsel for the National Labor Relations Board ("Board") arising from an unfair labor practice charge filed by former Company employee Mohamed Shahat ("Shahat"). The General Counsel alleges the Company violated Section 8(a)(1) of the National Labor Relations Act ("Act" or "NLRA") by threatening and interrogating Shahat and by disciplining and/or discharging Shahat and a second former Company employee, Amasis Yazid ("Yazid"). However, a review of the testimony and the documentary evidence demonstrates that the Complaint is without basis in fact and should be dismissed.

Administrative Law Judge Geoffrey Carter ("ALJ") held a three-day hearing in Kissimmee, Florida, on October 30-November 1, 2017 at which the parties presented testimony and documentary evidence in support of their respective claims and defenses. This brief is submitted pursuant to the ALJ's December 4, 2017 Order.¹

INTRODUCTION

This is a case about two employees whose self-assessments of their job performances and worth to the employer were inconsistent with reality, and about an employer which worked hard and consistently but unsuccessfully over a period of many months to improve those employees' job performances in order to meet reasonable and legitimate expectations.

Arash Mohajeri ("Mohajeri"), Shahat's and Yazid's former supervisor, is the Company supervisor accused of disrespect and allegedly violating Section 8(a)(1). However, the evidence demonstrates that he was a calm, professional engineer dedicated to helping his subordinate employees succeed, and a supervisor who used encouragement and assistance to motivate them.

Former Company engineer Shahat accuses Mohajeri of mistreating him. However, the evidence shows that the engineer misrepresented his skills during the hiring process and was a difficult employee who routinely resisted instructions and constructive criticism, requiring the Company to use extraordinary measures to try to motivate him and improve his job performance. For example, Shahat was given an overall "needs improvement" in the first draft of his 2016 performance evaluation but, in an effort to motivate him, his manager and Mohajeri decided to

¹ The transcript of the hearing in this matter is cited as "Tr. ____" followed by the cited page number and, sometimes, the name of the witness if important for context. The exhibits are cited "GC Ex. ____" or "Resp. Ex. ____" followed by the exhibit number and, in some citations, a notation as to the relevant portion of that exhibit. Citations often are grouped at the end of a paragraph in order to improve the readability of the text.

increase Shahat's final grade to a "meets expectations" assessment so he would not be placed on a performance improvement plan that would have had serious and negative impact on his career path. Although Shahat was informed at the time of his evaluation that his performance must improve, the Company's motivational effort--not required by any policy or procedure--was unsuccessful. In fact, approximately seven weeks later, Shahat refused a direct order from his supervisor to change the location of his workstation. Mohajeri's supervisor Phil Deen ("Deen"), the Senior Manager of Plant Engineering, and the Company's Vice President of Human Resources Brian Shannon ("Shannon") then decided that Shahat must be discharged because his performance had not improved and it was "time cut our losses." Shahat knew on that day (July 7, 2016) that his job was in serious trouble because of his refusal to relocate. However, Shahat was not immediately released after the dismissal decision because, on the next day that he was at work, July 11, 2016, Shahat filed a formal complaint of mistreatment by Mohajeri. The Company decided to postpone his discharge until the complaint could be investigated so that, if it was found that there was basis for it, the discharge decision could be re-considered. The investigation was completed, no wrongdoing was found, and Shahat's job performance did not improve, so the decision was implemented and he was released in October 2016. The evidence is clear and overwhelming that Shahat was discharged for legitimate reasons unrelated to a complaint he made the day after he knew he was in serious trouble with the Company.

Yazid was an employee engineer who was discharged after only fourteen months of employment during which he had to be repeatedly coached and counseled in the Company's efforts to improve his performance. Yazid received an overall "needs improvement" annual evaluation in May 2016 and thus, consistent with Company practice, a performance improvement plan ("PIP") was prepared for him. However, before the PIP could be administered, Yazid committed serious errors in conjunction with an "Engineering Change Notice" ("ECN") which, if not detected and corrected, would have resulted in substantial losses for the Company. Further, it appeared plain that Yazid had been dishonest in processing the ECN, suggesting that he not only was incompetent or careless but also of questionable integrity. Deen and Shannon decided Yazid should be discharged without finalizing and administering the PIP because such opportunity for improvement seemed futile. Again, as with Shahat, the evidence was clear and overwhelming that Yazid was discharged for legitimate reasons in accordance with normal Company policies and practices in making and implementing a discharge decision.

There was no credible evidence that Shahat was threatened or interrogated that either Shahat or Yazid engaged in concerted activity, or that either was treated in violation of Section 8(a)(1). In fact, an examination of Shahat's written complaint to the Company shows plainly that his allegations were purely personal and were in part petty/childish in nature or unrelated to his work for the Company. The evidence also shows that, even if it could be concluded that Shahat or Yazid engaged in concerted activity, there was no causal connection between such activity and their dismissals and they would have been discharged even if they had not engaged in it. The Complaint should be dismissed.

PROCEDURAL HISTORY

On November 29, 2016, Shahat filed an unfair labor practice charge claiming that the Company had violated Section 8(a)(1) of the Act. Although the allegations were conclusory and not specific, the Company responded in opposition, denying any violations and providing evidence to show that the Charging Party had been treated in accordance with the law and Company policy. On January 25, 2017, Shahat filed an amended charge; again, though the allegations were vague and conclusory, the Company responded in opposition, again denying any violations and demonstrating that it had complied with the law.

On March 31, 2017, the Regional Director for Region 12 of the Board issued a complaint alleging that the Company violated Section 8(a)(1) of the Act by disciplining and discharging Shahat, discharging Yazid and, through Mohajeri, threatening “employees” and instructing “employees” not to discuss complaints about their supervisor with other employees.² The Company filed a Response, admitting that Shahat and Yazid had been employed and discharged for legitimate reasons but denying the allegations of wrongdoing and any violations of the Act.

ALJ Carter conducted a hearing on October 30-November 1, 2016. The parties both presented witnesses and documentary evidence in support of their respective positions.

FACTS

A. Mitsubishi Hitachi Power Systems Americas, Inc.

The Company is in the business of designing, manufacturing, selling and installing large, complex and expensive gas turbines for power plants. The piping components of each turbine are critical to its operation because the piping is used to connect natural gas, lubrication oil, and cooling air to the various turbine components. The Company's group of "piping" engineers are

² General Counsel offered no evidence that Shahat actually was disciplined nor that “employees” other than Shahat were “instructed” or “threatened.” Further, the General Counsel repeatedly elicited testimony to establish that Shahat was not ever disciplined. *See, e.g.*, Tr. 137 (Shahat).

critical to the success of each project because "piping" inaccuracies and imprecision not only can cause project failure (with associated losses of substantial revenues) but also risk the safety of personnel working in or around the equipment. Tr. 224-225.

The Company is an "equal employment opportunity" employer and has policies to ensure employees are treated with respect, without regard to their protected characteristics and in compliance with law. Resp. Ex. 37, 38. The policies are communicated to employees in a handbook and employees receive periodic training in them. The Company's policies are overseen, in part, by the Human Resources department ("HR"). Brian Shannon ("Shannon") was the Vice President of Human Resources and was assisted, in part, by HR Manager Julie Hester ("Hester"). Tr. 375.

The Company has an "open door" policy by which any employee can talk to any other employee irrespective of level within the corporate hierarchy. The "open door" policy is intended to provide "transparency" and opportunities to address issues and fix any problems. Employees have successfully used the policy to resolve communications issues. The Company does not in any fashion limit or deter employee complaints. Tr. 225-226 (Mohajeri); 405-406 (Deen).

Company employees are formally evaluated annually in writing. An employee's supervisor first prepares a draft evaluation which then is reviewed by the supervisor's supervisor and then by Human Resources before it is finalized, delivered to, and discussed with the employee. Tr. 50-51. Preparation of evaluations is a time-consuming process but the Company believes they are critical because evaluations can affect an employee's career path and they "help the employee to be on right track . . . communicating [the Company's] goal and objectives and explaining to them what needs to be done." Tr. 250 (Mohajeri). There are five overall evaluation grades that can be given in various evaluation categories, ranging from "Below Expectations" to "Needs Improvement" to "Meets Expectations" to "Exceeds Expectations" to "Outstanding Achievement." An employee

who receives a less than "Meets" evaluation is placed on a performance improvement plan ("PIP"). Tr. 246-250 (Mohajeri); 376-378 (Shannon).

A PIP is prepared by the employee's supervisor and reviewed by the supervisor's supervisor. It contains tasks, goals and deadlines for the employee's actions during the PIP period, each of which is intended to improve performance. PIPs are used to address employee performance and behavior issues but a PIP is not a prerequisite to disciplining or to discharging an employee. Tr. 254-255 (Mohajeri); 491 (Deen); 342-343 (Hester); 381 (Shannon).

The Company sometimes must discharge employees for poor performance. The decision is made by the employee's management in conjunction with HR in order to ensure the discharge is necessary, appropriate, proportional to the performance/behavior issues, and consistent with the Company's past practices. Because of the seriousness of a discharge, and its obvious impact on the employee, there is no required timeline, so the decisional process and its implementation may take weeks. Employees need not be disciplined before being discharged for poor performance. Tr. 343 (Hester); 382 (Shannon).

The Company's HR department investigates employee complaints. The nature and scope of an investigation depend on the nature of the complaint being investigated. The investigator interviews persons who are thought to have knowledge of the facts and reviews documents that could provide information about the issues. Shannon supervises the investigations and reviews tentative investigation conclusions and the investigator's draft report. If the investigation finds there has been a violation of Company policies, corrective action is implemented. Tr. 379-381.

B. Supervisor Mohajeri and Manager Deen.

In 2016, at the times of their separations from the Company, Shahat and Yazid were supervised by Mohajeri who, in turn, was supervised by Deen.

Mohajeri is an Assistant Manager of Engineering responsible for the “piping” group. He manages the engineers doing the detailed piping design and engineering, including the preparation of their evaluations. Tr. 17. Mohajeri had approximately 12 subordinate employees in 2016, ten engineers and two interns. Tr. 332.

Mohajeri’s management style was to work with subordinates to improve their skills and help them grow; he frequently goes to his supervisor (Deen) to ask about ways he can help develop his employees. Tr. 407 (Deen). One of Mohajeri's management methods was to use "individual performance plans" prepared for and discussed with each engineer at the start of every year. The plans not only set out the Company's and employee's goals for the coming year but also were used by Mohajeri in periodic progress meetings with the engineer during the year. The individual performance plans also set the standards against which the employee's performance is measured at the annual year-end review. However, since “piping” is critical to a project and is very detailed oriented, Mohajeri insists on engineering accuracy and precision so some people could view him as a “micromanager.” Tr. 226-229 (Mohajeri).

Mohajeri addresses performance issues with his engineers by coaching them to ensure they understand what is necessary to meet the Company's job performance expectations. The supervisor uses discipline as a last resort. Tr. 250-251 (Mohajeri)(“The approach is not to hammer the employees. We want to keep the morale. So our intention is to coach them . . .”); 412 (Deen).

Mohajeri typically makes notes about his engineers’ performance issues and his coachings; the supervisor does not make a note every time he criticizes or coaches an employee but only for the more serious events. The entries are made contemporaneously with the event being described. Mohajeri's notes about employee issues have the appearance of a timeline, and he uses them for

all of his personnel who need coaching/counseling. Resp. Ex. 2 (Yazid timeline); 8 (Shahat timeline); 20 (timelines for other engineers in Mohajeri's group)³; Tr. 229-230 (Mohajeri).

Mohajeri's behavior and demeanor in the workplace have been described as fair, calm, and professional. He receives periodic performance evaluations by the Company and consistently has been graded as "Exceeds Expectations" or "Outstanding." Mohajeri has improved the capabilities, responsiveness/timeliness and effectiveness of the "piping" group since he was hired. He has never been disciplined or considered for discipline by the Company nor, prior to Shahat's July 11, 2016 complaint, had he been accused of discrimination or harassment or retaliation. Tr. 230-231 (Mohajeri); 407-408, 429 (Deen); 383-384 (Shannon).

Deen was the Company's "Senior Manager of Plant Engineering" in 2016. He was responsible for supervising certain departments in "Engineering," including Mohajeri's "piping" group. Tr. 47. Deen was a calm, focused, and affective manager of personnel who has always behaved in a professional manner. Deen has received "Exceeds Expectations" performance evaluation grades. Tr. 384.

C. Shahat's hiring, job performance and dismissal.

i. Shahat's hiring and the evolution of his duties.

Shahat was hired by the Company in July 2013 as a "Piping Project Engineer II." He was interviewed by Deen, who recommended he be hired in part because the engineer showed a 3D model of piping that he claimed to have prepared. Tr. 430.

Shahat's expected duties are reflected in the job description for the position. Resp. Ex. 26.⁴ Mohajeri also prepared a 2015/2016 in-year Individual Performance Plan and gave it to Shahat at

³ The "timelines" for the other Mohajeri engineers were shorter than Shahat's and Yazid's because those employees either had fewer performance issues and/or responded successfully to coaching/counseling. Tr. 300 (Mohajeri).

⁴ Shahat once sought a transfer to a different position within the Company. Deen thought that, since the engineer clearly was not succeeding in the "piping" group, a move within the Company would be good both for the employee

the start of the year; it showed the engineer's goals for the coming year. Resp. Ex. 7 (with the supervisor's comments in the "Objective" sections of the document and Shahat's comments in "Performance Notes," "What Could Have Gone Differently" and "Goals and Objectives Achieved" sections, Tr. 263-264).

Shahat's actual job duties had to be changed over time because of his inability or reluctance to perform the job's normal tasks. The changes were necessary in order to balance the Company's needs and his skills in light of what tasks Shahat was willing to do and his ability to do them, because he became less effective and was slow in performing his tasks so they had to be moved to other engineers. Changing Shahat's duties meant the scope of his responsibilities were reduced and he was contributing less to the overall work of the "piping" group. The evolution of Shahat's duties was such that, at the time the engineer left the Company, Shahat was basically an administrator doing simple tasks with job duties which "were very basic . . . we couldn't really assign certain jobs to him because we wouldn't get it on time or get it out correctly." Tr. 261 (Mohajeri); 435-436 (Deen).

ii. Shahat's job performance.

Deen directly supervised Shahat until Mohajeri was hired a few months later.⁵ The manager observed that the engineer's job performance was not always satisfactory. Most notably,

and for the Company. Tr. 61. The transfer position for which Shahat was considered was "project engineer" in the Company's Global Sourcing group; it would have been a lateral move, i.e., neither a promotion nor demotion. However, the Global Sourcing group refused to accept Shahat because it thought he was unduly aggressive in demanding a raise in conjunction with the transfer. Tr. 439-440 (Deen).

⁵ Shahat was not happy to learn Mohajeri would be his supervisor. Deen observed that he appeared upset, perhaps even angry, and demanded to know why he (Shahat) had not been considered for the position. Deen told Shahat that he did not have the necessary technical skills. It was Deen's impression that Shahat felt slighted and resented Mohajeri but the engineer's reaction to the Mohajeri hiring was not unusual: Shahat frequently asked about raises and promotions for which he was clearly not qualified. Tr. 432-433 (Deen).

Deen asked the engineer to prepare a "valve list" but found that Shahat was so slow and made so many errors that another engineer had to be assigned to finish the task. Tr. 431-2 (Deen).

Deen continued to have regular contact with and observations of Shahat's performance even after Mohajeri was hired.⁶ He observed that Shahat did not demonstrate the skills that he had claimed during the hiring process and, on other occasions, Shahat simply refused tasks that needed to be completed. For example, Shahat claimed during his job interview that he was skilled using 3D modeling software for piping but, after he was hired, he initially refused to do such work but later, after he began doing it, it was obvious he could not do it efficiently or accurately. (The Company's bad experience with Shahat's exaggeration of his skills during the job interview resulted in a change in the hiring protocol for such positions: the Company thereafter did not accept job applicants' claims that they can do 3D work but, rather, makes them actually demonstrate their skills by passing a practical exam before they are given a job offer.) Tr. 431-432, 436-438 (Deen).

Mohajeri had contact with Shahat every day that they both were at work, providing the supervisor numerous opportunities to observe the engineer's performance. Tr. 259. The supervisor observed numerous performance deficiencies over time, and made contemporaneous notes about them, consistent with the supervisor's normal practice. GC Ex. 8 and Resp. Ex. 8; Tr. 31. Mohajeri's "timeline" for Shahat reflects the more significant performance issues the supervisor observed over time, including:

- On "multiple occasions," Shahat's shifting his tasks to other employees without approval, demonstrating an inability to prioritize his work, and doing personal work during business hours;

⁶ Deen often answered Shahat's questions about career advancement and once Deen wrote him a letter of recommendation in conjunction with his application for a graduate study program at the University of Central Florida which Shahat started in 2014. GC Ex. 18; Tr. 148 (Shahat). The letter was positive but focused on the engineer's skills related to graduate study and his learning ability, that is, Deen did not comment on Shahat's technical engineering skills and would not have provided a similar letter to a potential Shahat employer. Deen's letter was written approximately two years before the end of Shahat's Company employment so it did not accurately describe his performance at the time he was discharged. Tr. 62, 434-435, 476 (Deen).

- Shahat's numerous errors in reviewing/checking drawings to be sent for fabrication (6/9/16 and 6/21/16), Resp. Ex. 12, 13, 14; Tr. 267-273;
- Shahat's inaccurate or incomplete work (2/24/16; 2/9/16; 6/9/16; 6/21/16; 6/23/16; 8/12/16); and
- Shahat's refusal or failure to communicate about issues (7/6/16; 8/10/16).

Id. The "timeline" also reflects many of supervisor Mohajeri's coaching/counseling sessions with Shahat, including on April 12 and June 5, 2015, "weekly meetings to... push him to finish his work" in late 2015, and on January 26, February 9, May 19 (the annual evaluation), June 9, June 21, June 23, August 10, and August 30, 2016 and "multiple occasions." *Id.* Deen observed many of the same Shahat performance issues, including Shahat's inaccuracies, untimely work, unauthorized delegation of assignments, and refusal to take ownership of matters. Tr. 444 (Deen).

The Company attempted to help Shahat improve his skills. The engineer received training (including a week-long training program in 3D work) and regular coaching and counseling. Mohajeri periodically came to Deen to discuss Shahat's performance, seeking advice about how to motivate Shahat into better performance; the two of them were for a time "trying to redefine his job. Give him assignments that matched his skills." Tr. 438 (Deen). Unfortunately, Deen and Mohajeri observed that their coaching/counseling of Shahat frequently was unsuccessful because he often resisted constructive criticism and would not take responsibility for his actions; the engineer frequently seemed "uncoachable." Tr. 261262.

iii. Shahat's refusal to perform 3D work.

Mohajeri's group did not have enough manpower in June 2015 so the supervisor asked Shahat to perform 3D work. Shahat refused, telling the supervisor it "was below him," despite the facts that each of the engineers in Mohajeri's group was expected to do such tasks, the job

description for Shahat's position had multiple references to 3D work, Resp. Ex. 26, and 3D work was even done by supervisor Mohajeri when necessary.⁷ Tr. 36-39; 274-275.

Mohajeri prepared a "Disciplinary Action Notice" for Shahat dated June 3, 2015. GC Ex. 10 and Resp. Ex. 10. Mohajeri showed the draft discipline to Shahat and discussed it with him but, in order not to harm Shahat's career with the Company by finalizing and placing the discipline in the employee's personnel file, the supervisor offered the engineer a second chance and Shahat took it, *i.e.*, he attempted 3D work. Mohajeri's "second chance" for Shahat was not required by Company policies or normal practices—the supervisor could have immediately written-up Shahat but “[Mohajeri's] intention is to encourage people to help . . . we are not in the business of punishment.” If the “Disciplinary Action Notice” had been finalized and place in Shahat's file, it would have affected the engineer's career path at the Company. Tr. 36-39; 273-278.

Mohajeri prepared a June 5, 2015 memo documenting Shahat's refusal to do the 3D work, Mohajeri's “second chance” opportunity, and the disposition of the draft "Disciplinary Action Notice." GC Ex. 11 and Resp. Ex. 16. In fact, neither the draft June 3, 2015 "Notice" nor the June 5, 2015 document is in Shahat's personnel file, Tr. 39, 45, and neither affected Shahat's compensation or benefits. Mohajeri also prepared a memo to Deen about the draft discipline and its resolution; it not only addresses Shahat's refusal to perform 3D work but also noted that Shahat for several months had “consistently exhibit[ed] a poor performance and also [was] having difficulties following directions given to him.” GC Ex. 12 and Resp. Ex. 17; Tr. 40; 278-280.

iv. The Company “bumps up” Shahat's 2016 evaluation so he could avoid a PIP.

Shahat was given an annual evaluation in 2016. It was prepared in the normal manner, that is, Mohajeri prepared a draft and sent it to Deen for review. Resp. Ex. 9. Mohajeri initially gave

⁷ Shahat also told Mohajeri that he would only work eight hours a day because of his personal commitments, including having to study for school, despite the fact that “piping” engineers were sometimes required to work more than forty hours per week to complete assignments. Resp. Ex. 10, 16; Tr. 275.

Shahat an overall "Needs Improvement" rating, *Id.* at p. 5, but, when Deen saw it, he noticed that the engineer was close to an overall "Meets Expectations" assessment because of the grades that Mohajeri had given Shahat in the various subsections of the evaluation. Deen thought modifying the draft evaluation slightly to increase Shahat's overall grade to "Meets," so he was not put on a PIP (as would be required if he was overall graded "Needs Improvement"), might better motivate Shahat to improve his performance. Mohajeri readily agreed, recognizing the evaluation was an important document and could impact the engineer's career path at the Company. Accordingly, Mohajeri adjusted various evaluation category grades in order to raise Shahat's overall grade, including increasing the engineer's "time management" score from "Needs Improvement" to "Meets," increasing his "creativity" score from "Meets" to "Exceeds Expectations," and increasing his "bench strength and teamwork" score from "Below Expectations " to "Needs Improvement." (The latter change was particularly important because, if Mohajeri had given the engineer a "Below" in that category, it would have ended Shahat's career at the Company.) The final evaluation resulted in Shahat receiving an overall "Meets Expectations" rating. GC Ex. 7 and Resp. Ex. 18. However, Deen was concerned about the possibility of inconsistent messages in bumping Shahat to achieve a "Meets" grade so he told Shahat about the artificial increase in his overall evaluation grade.⁸ Tr. 29-31, 280-284 (Mohajeri); 441-443 (Deen).

Shahat's annual evaluation was delivered to him by Mohajeri in mid-May, 2016. The supervisor told the engineer about what job performance improvements would be required, and that Shahat had been given a break in the critical "bench strength" category on the evaluation. Also at that evaluation session, as was his normal practice, Mohajeri asked Shahat to comment

⁸ Shahat received a small raise in conjunction with the annual evaluation for the same reason his overall evaluation grade was increased--to motivate better performance. Unfortunately, Shahat was not pleased with the raise he was given and complained to both Mohajeri and Deen that because he had received a "very good" evaluation he deserved a larger raise. Tr. 286.

about him (Mohajeri) but Shahat was very quiet. At the end of the evaluation meeting, Shahat knew the Company believed there were significant issues with his performance. Tr. 283-286.

Deen also talked to Shahat about the “bumped up” evaluation when the engineer came to him about a promotion or raise. Shahat said he had been receiving excellent performance reviews, but Deen responded “we cut you a break on your last performance review.” Tr. 443 (Deen).

Shahat’s performance did not improve after the “bumped up” evaluation. Mohajeri's timeline for the engineer (Resp. Ex. 8) continued to reflect performance problems requiring coaching and Deen also observed on-going issues. Tr. 444 (Deen).

v. Shahat’s refusal to relocate his cubicle.

Mohajeri discussed with Deen in early Summer 2016 the possibility of relocating “piping” engineers in order to place their individual work stations closer to Company personnel with whom they had the most interactions and common tasks, thereby improving the group's efficiency. Approximately 6 or 8 personnel on Mohajeri’s team would be changing their work stations. Deen approved the relocations, one of which was to move Shahat. If one of the engineers scheduled to move did not do so, then other personnel could not move. Tr. 288-290 (Mohajeri); 445-446 (Deen).

Mohajeri informed his engineering personnel about the cubicle relocations in July 2016, several weeks in advance of the anticipated move date; he told them the moves were intended to improve communications among team members. Tr. 155 (Shahat). Mohajeri formally notified Shahat of the date of his cubicle relocation on July 7, 2016 and confirmed it with an email. Resp. Ex. 19. Shortly thereafter on that day, Shahat told Mohajeri that he refused to move. Mohajeri again explained to the engineer the purpose for the moves and asked Shahat if he understood that refusing his supervisor's direct request was insubordination. Shahat replied that Mohajeri did not have authority over him and said he (Shahat) wanted to speak to Deen. Mohajeri did not

discourage or prohibit Shahat from talking to Deen and, in fact, told the engineer that he certainly could speak to Deen because of the open door policy. Mohajeri was not angry or upset because Shahat wanted to meet with the manager. Tr. 289-292 (Mohajeri).

Shahat met with Deen on July 7, 2016 to complain that Mohajeri had not considered the engineer's opinion about the cubicle moves and that Shahat wanted to stay at his current work location because he liked the view and because it was better for Shahat studying for his Master's degree. Shahat asked Deen essentially "what should I do?" and Deen told him he should move because employees do not own the offices and "where you need to sit is where your boss tells you to sit." The Deen-Shahat meeting about the change in cubicles ended by the manager making it plain he was disappointed in Shahat and "you better think about it." Deen believes he left the impression with Shahat that not relocating was a significant issue. Tr. 446-448 (Deen).

Mohajeri prepared a notice of discipline for Shahat arising from the engineer's refusal to move his cubicle; it noted that Shahat understood Mohajeri's request and the engineer's refusal was a recurring situation (referring to Shahat's refusal to do 3D work the prior year). GC Ex. 13 and Resp. Ex. 11. Deen reviewed and approved the notice but it was never delivered to the engineer because, on the next day that Shahat was at work (July 11, 2016), he made a formal complaint about the supervisor to Human Resources which then instructed not to relocate Shahat.⁹ Tr. 41-42, 45, 293- (Mohajeri); Tr. 448-449 (Deen).

vi. Shahat's discharge.

Deen first began to think seriously about discharging Shahat at the time of his annual evaluation in May 2016 (the evaluation in which the initial draft was an overall "Needs

⁹ Shahat never actually changed cubicles during his Company employment, thereby frustrating Mohajeri's plan to improve communications among the employees; Shahat's refusal to move caused a "domino effect" whereby other personnel could not move to new locations. Tr. 290 (Mohajeri); 449 (Deen)("it put everything to a stop").

Improvement"). Tr. 296 (Mohajeri); 457 (Deen). Deen finally decided on July 7, 2016 that Shahat must be discharged after the engineer's refusal to move his cubicle. Deen determined that discharge was appropriate because Shahat had not improved his job performance since his evaluation despite warnings and counselings and because of his second refusal of a direct order from his supervisor. Tr. 457-458 (Deen).

Deen made the Shahat discharge decision on July 7, 2016, the day Shahat came to see him about the cubicle relocation. Tr. 457. On that day, or the following day (July 8), Deen spoke to Shannon in Human Resources to discuss the facts that Shahat had received a marginal evaluation in May, his performance has not improved, and he had just been insubordinate (i.e., refused an order from his supervisor). Deen told Shannon something like "we just need to cut our losses and move on." Tr. 457. Shannon agreed and told Deen that Human Resources would begin processing the papers to separate Shahat.¹⁰ Tr. 457-458 (Deen); 387-388 (Shannon).

Deen made the decision to discharge Shahat on behalf of Engineering. Tr. 50, 457 (Deen). Shahat had not complained about Mohajeri at the time that Deen made the decision to dismiss Shahat. In fact, Deen first learned of Shahat's complaint on July 11 (Shahat's first day at work after their cubicle conversation on July 7) when, on that date, Shahat sent Deen an Outlook meeting invitation. Resp. Ex. 28. Shahat's continuing unsatisfactory job performance was the only reason he was discharged. Tr. 52, 459 (Deen); 99 (Shannon).

Deen did not consider disciplining Shahat or putting him on a performance improvement plan as alternatives to discharge because such measures seemed futile. A PIP and discipline are intended to motivate improved performance but the Company's prior numerous

¹⁰ There were two "discharge decisions" as to Shahat: the decision to release him and the decision when to release him in light of his complaint about Mohajeri. Tr. 100-101 (Shannon). Discharge decisions are often made before a Company employee actually is separated. Tr. 100 ("In many cases we make the determination to discharge people long before we do it for a multitude of reasons")(Shannon).

coachings/counselings of Shahat, and its repeated efforts to motivate him, convinced Deen that there was not any chance for improvement. Tr. 464 (Deen).

Shahat filed with Human Resources his complaint about Mohajeri on July 11, 2016. Deen and Shannon met later that week to consider whether the Company should terminate the engineer now that he had filed his complaint. Resp. Ex. 39 (Outlook invitation). They concluded Shahat should not be discharged at that time because it would appear retaliatory and inconsistent with the “open door” policy and it would not allow the Company to investigate Shahat's allegations. It was decided Shahat should not be required to relocate to a different cubicle and the execution of the July 7 discharge decision would be put on hold until the investigation had been completed so that, then, the Company could revisit the decision if there was evidence of wrongdoing by Mohajeri. Tr. 464-465 (Deen); 389-390 (Shannon).

Shahat was informed of his discharge in October 2016 at the conclusion of the Company's investigation of his complaint (discussed below).¹¹ Deen decided to execute Shahat's dismissal at that time because his performance had not improved since the decision had been made in early July. The Company followed its normal policies and practices in making and implementing the decision to discharge Shahat. Tr. 465 (Deen); 391 (Shannon).

Deen, Shannon, and Hester informed Shahat of his separation; Mohajeri was not present because he was on a business trip. Shahat was told he was being dismissed because of his continuing unsatisfactory performance. Shahat asked if the discharge was because of Mohajeri but he did not complain about Mohajeri or the supervisor's management style nor did he then claim that other employees were concerned about Mohajeri or his management style. Shahat was listed as "ineligible" for rehire because of his poor performance. Tr. 465-466 (Deen).

¹¹ There was a brief delay from the conclusion of the investigation until the actual implementation of the Shahat discharge because the Company was very busy at that time so many people were out on business travel. Tr. 465.

D. Yazid's hiring, job performance, and dismissal.

i. Yazid's hiring and job performance.

Yazid was hired in April 2015. Mohajeri interviewed him and recommended he be hired. Mohajeri was Yazid's supervisor throughout the engineer's employment and had contact with Yazid on a daily basis. Tr. 232-233.

Yazid's job duties were set forth in a "Senior Piping Designer" job description. Resp. Ex. 22. Mohajeri also prepared and provided to Yazid an Individual Performance Plan at the start of the year, Resp. Ex. 1; it was to act as a "compass" for the employee "to know what they need to do at the high level," so it set out Yazid's goals and the Company's expectations. Tr. 232-235.

Yazid did not perform satisfactorily. Tr. 236-259 (Mohajeri). Since Mohajeri had daily contact with Yazid, the supervisor had numerous opportunities to observe the engineer's performance. Mohajeri saw numerous performance deficiencies over time, and made contemporaneous notes about them, consistent with his normal practice; the supervisor ensured that the information in the timelines was correct. GC Ex. 4 and Resp. Ex. 2; Tr. 22. Mohajeri's Yazid "timeline" reflects the more significant issues the supervisor observed, including:

- "On multiple occasions," Yazid "works long hours but output is minimal";
- "On multiple occasions," Yazid's "accuracy is low and he has made multiple mistakes" on several projects;
- Yazid's inability to correct mistakes identified to him after several opportunities to do so (1/11/16), Resp. Ex. 5; Tr. 239-241 (Mohajeri);
- Yazid's drawings "compared to a senior designer position" have a really low quality and are missing key components (2/4/16); and
- Yazid's drawing errors were so extensive that an entire time-sensitive package had to be "reworked from scratch" for three days by a team of three people (2/25/2016); Tr. 243-244 (Mohajeri).

Id. The "timeline" also reflected numerous Mohajeri coaching/counseling sessions with Yazid, including on January 11, February 9, March 28, May 19 (the annual evaluation), and June 14, 2016 as well as other "multiple occasions." *Id.* Deen observed that Yazid had issues with his accuracy and speed of work. Tr. 411-412 (Deen).

Mohajeri coached and counseled Yazid in attempts to improve his performance, but the supervisor's efforts were unsuccessful. Mohajeri prepared Yazid's 2016 evaluation and, after Deen reviewed it, asked questions about it, and agreed with its conclusions, it was delivered to Yazid in May 2016. The evaluation's overall assessment was that Yazid's "Needs Improvement." GC Ex. 3 and Resp. Ex. 3; Tr. 21. The evaluation specifically criticized Yazid for his insufficient skills, accuracy, output, and "prioritizing"; Yazid's comments on the evaluation (signified by "AY") acknowledged many of the deficiencies. *Id.* Mohajeri thought Yazid's job performance issues were "quite severe," Tr. 251, but the supervisor did not discipline the engineer because it was the Company's practice not to discipline for such issues: it has a substantial investment in employees so attempts to salvage them if at all possible. Yazid was never disciplined, i.e., he never was issued a "Disciplinary Action Notice." Tr. 19.

Yazid was shown his annual evaluation by Mohajeri, who discussed specifically the engineer's shortcomings and areas for improvement. Tr. 335-336. Yazid understood and agreed with the overall rating. Tr. 329. Mohajeri asked Yazid at the meeting, in the supervisor's standard fashion, if the engineer had comments about Mohajeri but the engineer did not have any. Tr. 251.

Mohajeri began the preparation of a performance improvement plan for Yazid consistent with the Company's protocol that a "Needs Improvement" evaluation would result in a PIP. Tr. 26-27 (Mohajeri); 412 (Deen). The plan was specific and detailed, identifying particular areas of improvement required of Yazid, including completion of projects without assistance and minimal

errors. Resp. Ex. 4, p. 3.¹² The "ethics/values/integrity/trust" box was checked on PIP page one, Resp. Ex. 4, p. 1, because of a major Yazid error in the preparation of an "engineering change notice" ("ECN") (discussed below.) The PIP mentioned the ECN but was not prepared only because of it. Tr. 252-254, 327-328 (Mohajeri); 413-414 (Deen).

The PIP was never delivered to Yazid because, while it was being prepared, he made a major error that could have caused substantial financial and reputational losses to the Company in conjunction with an "engineering change notice" ("ECN"). Tr. 255 (Mohajeri); 414-415 (Deen).

ii. Yazid's recommendation and preparation of an ECN.

In June, 2016, Yazid came to Deen to request the manager's approval of an ECN to change pipe thickness on two large turbine projects. The engineer characterized the matter as "urgent" and sought Deen's approval because Mohajeri was out of the office. Tr. 415-416 (Deen).

Yazid told Deen an ECN was necessary because the two projects' specifications called for one thickness of pipe but in fact but a different thickness had been ordered. Specifically, Yazid told Deen that "thin" pipe (called "Schedule 40") was required by the drawings but thicker pipe ("Schedule 80") had been incorrectly ordered. Deen was skeptical of Yazid's analysis because it was Company practice to use Schedule 80 ("thick" pipe) in such situations, *i.e.*, the manager thought the engineer wanted to deviate from the norm. Accordingly, Deen asked Yazid if he had checked the drawings. Yazid said he had personally checked and had confirmed that the design was based on "thin" pipe, *i.e.*, Yazid said again that Schedule 40 (thin-wall pipe) was required by the drawings. Deen asked if Yazid needed to double-check but the engineer told Deen he already had checked and "I'm positive." Tr. 419 (Deen). Deen approved the ECN in reliance on the

¹² There was a brief delay between the delivery of the Yazid evaluation in May and the preparation of the PIP because the "piping" group was very busy, many of its personnel were traveling on business during that period, and it was important to carefully consider the content of the PIP in light of its potential impact on Yazid's Company career. There is no deadline for the issuance of a PIP nor any Company policy or practice as to how promptly it must issue. Tr. 253-254 (Mohajeri); 413 (Deen).

engineer's statement that an ECN was necessary. Deen then called the project manager to report an ECN was necessary and it would increase the cost of the project. Tr. 416-421 (Deen).

Mohajeri returned to work shortly after the ECN was initiated and quickly discovered that it was unnecessary: contrary to what Yazid repeatedly had reported to Deen, the drawings called for use of the Schedule 80 ("thick") pipe actually ordered. Resp. Ex. 23. Mohajeri informed Deen and the ECN was cancelled. Tr. 254-257 (Mohajeri). The project manager was informed that the ECN was cancelled and indicated to Deen "he [project manager] lost some faith in what we were doing as an engineering organization." Tr. 426 (Deen).

Deen subsequently personally checked the drawings and saw that Yazid's repeated statements about the drawings were simply incorrect. Deen concluded Yazid had been dishonest when he claimed to have checked the drawings to confirm his (Yazid's) recommendation that an ECN must issue. Tr. 421-423; Resp. Ex. 23.

Mohajeri asked Yazid to prepare a memo explaining his actions and recommendation about the ECN. Deen reviewed the Yazid memo but it did not change Deen's assessment that Yazid simply was wrong and had not been honest in communicating with the manager. Deen prepared a memo summarizing the situation. Resp. Ex. 25. Specifically, despite Yazid's attempt to explain himself, Deen believed that, in recommending the issuance of the ECN, the engineer had been negligent and dishonest, actions which caused the Company loss of reputation with the project manager and could have caused financial losses of approximately \$46,000, could have delayed the completion of the projects, and could have resulted in safety hazards. Tr. 423-427 (Deen).

iii. Yazid's discharge.

Deen made the decision to discharge Yazid on behalf of Engineering. Tr. 50. Although the Company initially planned to discipline Yazid for the ECN situation, Deen determined that the engineer's work on the ECN, in light of his recent "Needs Improvement" evaluation and his

continuing poor performance despite coachings/counselings, made it clear that Yazid was not trainable, that he might not be honest, and that he should be discharged. Deen made the decision based on “the sum total of his performance in the time [Yazid] was there.” Tr. 51, 427 (Deen). Shannon, representing HR, agreed with Deen’s determination. Tr. 427.

Yazid was discharged because of his on-going performance issues despite repeated coaching and counseling. His unsatisfactory performance was the only reason for his discharge; there were no factors considered in the Yazid discharge decision other than his on-going and seemingly uncorrectable poor job performance. Tr. 18. Other than Shahat, Deen did not believe there were any other piping employees performing as poorly as Yazid at that time. The Company followed its normal policies and practices in discharging Yazid. Tr. 258-259; 428.

Yazid was told of his discharge at a meeting in July, 2016. During the meeting, despite opportunities to do so, Yazid did not complain about Mohajeri or his management style nor did he indicate any other employees were concerned about Mohajeri or his management. Tr. 428 (Deen).

E. Shahat’s complaint to the Company.

On July 11, 2016, Shahat submitted his complaint about Mohajeri. The engineer first met with Deen on that day and showed the manager two documents. The meeting was the result of Shahat’s Outlook invitation to Deen, an invitation having the subject line “[CONFIDENTIAL] Notification of Management Complaint.” Resp. Ex. 28. Shahat made it plain to Deen in that meeting that his complaint was triggered by Mohajeri's instruction to move his cubicle. The engineer began his conversation with Deen by asking "do I still have to change cubicles?", referring to the previous Shahat-Deen conversation on July 7. Deen replied that nothing had changed and the engineer should already have moved and, then, Shahat said essentially "I have to do this" and handed Deen two documents. Deen quickly scanned the documents and, though he was surprised by their content, the manager immediately recognized it

was an issue requiring the attention of HR so Deen took Shahat to that department.¹³ TR. 54-56; 459-463 (Deen).

One of the Shahat documents given to Deen in the July 11 meeting was a memo addressed to Deen. It set forth Shahat's personal complaints about Mohajeri, alleging that he had been subject to disrespect and verbal abuse from the supervisor. Resp. Ex. 29.

The second document shown by Shahat to Deen at their July 11 meeting was a memo addressed to HR, describing Shahat's personal unhappiness with Mohajeri. GC Ex. 9 (complaint without attachments); Resp. Ex. 21. The memo accused Mohajeri of refusing to provide him a reference letter, of forcing Shahat to do 3D work and moving his cubicle, of criticizing Shahat for errors in checking drawings, and of disrespectful conduct in connection with an off-premises music concert, Shahat's sneakers, and a birthday card. *Id.*¹⁴

Mohajeri first learned about Shahat's complaint on July 11, 2016. Tr. 32, 301-302. The supervisor immediately thought the "cubicle relocation" situation triggered the engineer's complaint. Mohajeri was not angry but merely was surprised and confused with the complaint, because Shahat never previously had expressed such thoughts. *Id.*

Mohajeri and Deen never felt or showed irritation or anger or "attitude" to Shahat after they learned about the complaint, nor did they treat the engineer differently thereafter, i.e., "[i]t was business as usual." Tr. 302-303 (Mohajeri); 471-472 (Deen). Mohajeri was not concerned that Shahat's complaint would negatively impact the supervisor's future because he (Mohajeri) was

¹³ Deen was surprised by Shahat's complaint documents. No other employees had ever complained to Deen about Mohajeri and the manager always had observed the supervisor to be professional, fair, and supportive of his subordinates. Shahat's allegations about Mohajeri were "in conflict with everything that I knew and had seen how Mr. Mohajeri had conducted himself at work." Tr. 468.

¹⁴ One of the attachments to Shahat's memo to HR actually contradicted an allegation in it: although Shahat's memo claimed that co-worker Meysam Abdollahi had not been notified of the relocation, GC Ex. 9 (seventh bullet point), the July 7 email attached to the complaint by Shahat shows exactly the contrary, i.e., Shahat and Abdollahi were notified together about the cubicle swap. GC Ex. 42.

confident that he had done nothing wrong and “[b]ecause I’m honest in what I do.” Tr. 303. Deen never observed any Mohajeri anger or irritation to Shahat, or different treatment of him, after Shahat submitted his complaint; the supervisor only seemed confused, thinking that he (Mohajeri) perhaps had not worked hard enough to motivate and coach Shahat. Tr. 472-473 (Deen).

Mohajeri never talked to Shahat about the engineer's complaint.¹⁵ Although Shahat wanted to have private meetings with him, Mohajeri refused because he was concerned that what the two of them might discuss would be misunderstood or be twisted by Shahat; the supervisor said he was willing to meet if there was a third person present.¹⁶ Tr. 303-304 (Mohajeri). In fact, Deen advised Mohajeri to have another person present when talking to Shahat. Tr. 469-470.

F. The Company’s investigation of Shahat’s complaint.

The Company's investigation of Shahat's complaint was conducted by Hester with Shannon’s supervision. Hester interviewed witnesses thought to have knowledge of the Shahat allegations, reviewed documents, and formulated a report. Shannon communicated with Hester about the investigation and the information she gathered.¹⁷ Tr. 393-394.

Hester met with Shahat on July 11, 2016, the day he filed his complaint with HR. He said Mohajeri had been rude to him, had not been open to Shahat’s opinions about operations, and had requested that Shahat make up work when the engineer took a vacation day, and that Shahat did not like the supervisor’s “management style.” Resp. Ex. 33. Hester asked Shahat if there were

¹⁵ Shahat testified about an alleged meeting with Mohajeri in which the supervisor supposedly threatened the engineer. However, as discussed in “Argument,” below, Charging Party’s testimony is simply not credible.

¹⁶ Shahat's tendency to twist or misunderstand communications is exemplified by a Mohajeri-Shahat conversation about the engineer's possible transfer (as discussed in footnote 4, above). Shahat mentioned to the supervisor that he might transfer to a different work group and, when Mohajeri said he was fine with it, Shahat then said "you're trying to push me out." Tr. 286-287 (Mohajeri).

¹⁷ Shannon and Hester thought that she interviewed all appropriate personnel during the investigation. She did not speak to Yazid (he was no longer employed at the time of the interviews) nor to other engineers reporting to Mohajeri not only because Shahat's complaint alleged discrete, specific issues personal to Shahat but also because he refused to provide her names of potential witnesses and said he did not want to speak on behalf of other employees. Tr. 74, 358.

other employees who felt they were being mistreated by Mohajeri, so she could interview them to find out if there was a problem with the supervisor and, if so, the nature and extent of such issues. However, Shahat refused to provide her with names, stating that he did not want to speak on behalf of other people and "he couldn't speak for others of the team." Tr. 71-72, 349 (Hester). At the end of the meeting, Hester told Shahat the Company would investigate his allegations. Hester made a note of her meeting with Shahat. Resp. Ex. 33. During the meeting, Hester tried to stay neutral and did not say anything like "this is not allowed" as to Shahat's allegations. Tr. 347.

Mohajeri prepared a written response to Shahat's complaint and submitted it to Human Resources. Resp. Ex. 15; Tr. 34-35. The supervisor explained in his written response that (a) he was not qualified to write a recommendation for Shahat because of his limited work experience with the engineer so encouraged Shahat to get a recommendation from Deen (which Shahat actually did); (b) Shahat was required to do 3D work because it was part of his job, as with all "piping" engineers; (c) Mohajeri had, in fact, criticized Shahat's work checking drawings because he had made errors as the final approver before the drawings were to be released, but Mohajeri had not become upset; (d) the supervisor had not engaged in the "concert," "shoes" and "birthday card" conduct claimed by Shahat; and (e) the cubicle relocations were necessary to improve communications as the "piping" group expanded. *Id.*; Tr. 305-10 (Mohajeri). Mohajeri's response was considered by investigator Hester. Tr. 359.

Deen responded in writing to the Shahat's memo. GC Ex. 17 and Resp. Ex. 30; Tr. 56-57. The manager reported, in part, that he had "never witnessed any behavior from Arash Mohajeri that remotely resembles bullying or intimidation toward Mr. Shahat or any other member of this organization. What I have directly witnessed from Arash is an individual who treats those around him in a professional manner." Resp. Ex. 30.

Hester learned in her investigation that Shahat had performance issues, that he had difficulty accepting criticism, and that he often would not take responsibility for his actions. She also observed that Deen and Mohajeri appeared confused with the filing of Shahat's complaint because they said they had tried to work hard with the engineer and thought they had been accommodating of his school schedule. Hester did not have any indication that Deen or Mohajeri were angry because Shahat had made his complaint nor did they express to her any suggestion that Shahat should be disciplined or fired because of his complaint. Hester made a note of her meeting with the managers. Resp. Ex. 36; Tr. 357.

Hester spoke to Shahat on several occasions after her initial interview of him. He was checking on the progress of her investigation but never provided any additional information to support his claims nor did he ever provide the names of other persons who might have knowledge of his claims or disrespect by Mohajeri. Tr. 74, 349 (Hester).

Hester prepared a report describing her activities and summarizing her findings.¹⁸ She used the Department of Labor's "severe and pervasive" standard for assessing whether Shahat had been subjected to a hostile environment. GC Ex. 21 and Resp. Ex. 36 (report); Resp. Ex. 35 (DOL "Workplace Harassment" publication). The Company's investigation concluded that Shahat had not been subjected to conduct in violation of Company policy but, in fact, the Shahat-Mohajeri relationship seemed to involve a personality conflict.¹⁹ Resp. Ex. 36; Tr. 360-364, 367-368 (Hester); 393-394 (Shannon).

¹⁸ Hester's investigation was not completed for a few weeks because major HR projects were then underway and because of the travel schedules of the people involved. Tr. 353. There was no required deadline/timeframe for investigations. Tr. 365.

¹⁹ The outcome of the investigation was determined by Shannon and Hester. Although the engineers provided information during the investigation, they were not involved in deciding its outcome. Tr. 361 (Hester).

APPLICABLE LAW

Section 7 of the Act provides in part that "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . ." 29 U.S.C. §157.

In order to be protected under Section 7, an employee's conduct must be both "concerted" and engaged in for the purpose of "mutual aid or protection." The elements are obviously closely related but also analytically distinct. *See, Summit Regional Medical Center*, 357 NLRB No. 134, (2011). The "concerted" and "mutual aid or protection" elements are analyzed using an objective standard. *Fresh and Easy Neighborhood Market, Inc.*, 361 NLRB No. 12 (2014).

i. "Concerted activity".

Activity is "concerted" if the employee's actions may be linked to his co-workers. *See NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 831 (1984); *Meyers Industries, Inc.*, 268 NLRB 493, 497 (1984) (*Meyers I*), *remanded sub nom Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), *cert. denied*, 474 U.S. 948 (1985), *supplemented Meyers Industries, Inc.*, 281 NLRB 882, 887 (1986) (*Meyers II*), *aff'd sub nom. Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), *cert. denied*, 487 U.S. 1205 (1988).

"Concerted activities" are those "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." *Meyers I*, 268 NLRB at 497. In *Meyers II*, the Board again approved the proposition that "a conversation may constitute a concerted activity although it involves only a speaker and a listener, but to qualify as such, it must appear at the very least it was engaged in with the object of initiating or inducing or preparing for group action or that it had some relation to group action in the interest of the employees." 281 NLRB at 887, *quoting Mushroom Transportation Co. v. NLRB*, 330 F.2d 683 (3d Cir. 1964)(citations

omitted) (emphasis added). The analysis is a factual one based on the totality of the record evidence; as noted by Member Miscimarra in *Fresh and Easy, Meyers II* found that the relevant considerations “included, for example, (a) whether other employees authorized or instructed the individual to speak for them; (b) whether other employees ‘were aware of and supported’ the individual's presentation to management; and (c) whether the individual previously discussed a ‘common complaint’ with other employees who, in turn, ‘refrained from making [their] own ... complaint’.” 361 NLRB No. 12 (Miscimarra, concurring in part and dissenting in part)(citations omitted).

However, activities including co-workers are not necessarily "concerted activity." As the Third Circuit noted, "[A]ctivity which consists of mere talk must, in order to be protected, be talk looking towards group action. If its only purpose is to advise an individual as to what he could or should do without involving fellow workers or union representation to protect or improve his own status or working position, it is an individual, not a concerted activity, and, if it looks forward to no action at all, it is more than likely to be mere 'gripping'." *Mushroom*, 330 F.2d at 685. Further, the Eleventh Circuit has noted, “[p]urely personal griping does not fall within the scope of protected concerted activity.” *Rockwell Int’l Corp. v. NLRB*, 814 F.2d 1530, 1536 (11th Cir. 1987).²⁰ See also *NLRB v. Deauville Hotel*, 751 F.2d 1562, 1571 (11th Cir. 1985)(holding that employee complaint about assignment to a lower-ranking job was not protected concerted activity). See also *Praxair Distribution, Inc.*, 358 NLRB No. 7 (2012)(adopting holding that “all of [charging party’s] complaints about [co-worker’s] conduct are personal in nature”).

²⁰ Decisions of the United States of Court of Appeals for the Eleventh Circuit are particularly relevant because any review of a Board decision may be conducted by that court.

ii. Section 8(a)(1).

The right to engage in concerted activities is protected by Section 8(a)(1) of the Act, which makes it an unfair labor practice for employers "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [S]ection 7." 29 U.S.C. §158(a)(1). Thus, an employer who discharges an employee for engaging in concerted activities protected by the Act violates Section 8(a)(1). *Citizens Investment Services Corp. v. NLRB*, 430 F.3d 1195 (D.C. Cir. 2005).

In order to establish a Section 8(a)(1) violation, the General Counsel first must make a *prima facie* showing that support an inference the aggrieved employee was engaged in protected concerted conduct, the employer was aware of it, and the protected activity was a motivating factor in the employer's decision to take adverse action. *Id.* See also *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980); *Meyers I*, 268 NLRB at 497. If the General Counsel makes such a showing, the employer may rebut the inference by showing by a preponderance of evidence that the same action would have taken place in the absence of the protected conduct. *Id.* Of course, refusal to obey instructions constitute reasonable grounds for discharging an employee: discharge for refusal to obey instructions is perfectly lawful because in part, "discipline of an employee is a matter left to the discretion of the employer." *Media General Operations, Inc. v. NLRB*, 394 F.3d 207, 212 (4th Cir. 2005) (citations omitted).

ARGUMENT

A. Shahat was not a credible witness.

The General Counsel's case essentially relies on Shahat's testimony because there were no witnesses corroborating his versions of critical events. However, Shahat cannot be believed.

Credibility determinations typically rely on various factors, including "the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or

admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole.” *Hills & Dales General Hospital*, 360 NLRB 611, 615 (2014)(citations omitted).

Shahat was not a credible witness. His excited presentation, his hyperbole, his attempts to volunteer information or argue with the examiner, and his statements conflicting directly both with his own statements, the testimony of other witnesses, exhibits, and simple logic make large portions of his testimony simply unbelievable. For example, Shahat claimed that, when he first was interviewed by Hester about his complaint on July 11, 2016, she reacted to his written memo to HR with comments such as “oh my God, oh my God. This is bad.” Tr. 128 (Shahat). Shahat would have the ALJ believe that an experienced HR manager, who twice testified calmly and professionally, would, upon her first reading of Shahat’s memo and without further inquiry, immediately conclude that his allegations about such things as routine work assignments, “sneakers” and a birthday card were horrendous and unacceptable. It is illogical to think any HR professional would have made such comments.²¹

Similarly, Shahat’s testimony about his supposed conversation with Mohajeri, Tr. 130, is unbelievable in light of his account and the record evidence. Shahat testified that, in that conversation (for which there were no witnesses), Mohajeri threatened him about the engineer’s complaint and supposedly instructed Shahat not to discuss it with other employees. Tr. 130-132 (Shahat). However, Mohajeri unequivocally but calmly denied any such communication with Shahat, Tr. 301, while the record evidence shows the supervisor worked with Shahat for many months in many ways in order to improve his performance and advance the engineer’s career at the Company, including his arranging for training for Shahat, Tr. 262, giving Shahat a “second

²¹ Witness Yazid also had credibility issues as evidenced in part by his answering General Counsel’s questions even before they were asked. See, e.g., Tr. 192-193 (“Q. Do you recall another incident where you have a conversation with Mr. Shahat about -- A. Yes.”).

chance” to avoid discipline for the refusal to do 3D work, Tr. 273-278, re-writing an unfavorable draft evaluation so Shahat would not be placed on a PIP, Tr. 280-284, and not immediately discharging Shahat for refusing to move his cubicle. Tr. 291-294. Further, although Shahat described Mohajeri as loud and aggressive in that supposed meeting (and at other times), the preponderance of the evidence was that Mohajeri was invariably calm, quiet, professional and had never been previously accused of such disrespect.

Further, Shahat’s inconsistencies make it plain that his version of the “cubicle” incident cannot be believed. For example, though he testified he did not refuse to change cubicles, and “I had no objection,” Tr. 156, such testimony is belied by his HR complaint in which he says in part “I unfortunately will not be able to go through with the change Mr. Arash has mandated . . . “ Resp. Ex. 21 at p. 2. And, though he testified on direct examination that he was not given a reason for the relocations, he admitted on cross-examination that Mohajeri “said something about the communications between team members.” Tr. 155 (Shahat). Finally, Shahat testified that moving his cubicle was not a big issue, Tr. 158, but his HR complaint makes it plain the relocation was a significant problem for various reasons personal to Shahat. Resp. Ex. 21 at p. 2.

Finally, Shahat’s testimony about several years of disrespect and bullying cannot be believed. It simply is illogical. Although Shahat testified he had had periodic communications with Company HR personnel Shannon and Hester, Tr. 146-147, and Shahat trusted Deen, Tr. 149 (Shahat), and Shahat clearly gave the impression that he is not shy about asserting himself, Shahat admitted that never sought HR’s or Deen’s advice or assistance about Mohajeri prior to his refusing to move his cubicle on July 7, 2016 and his complaint on July 11, 2016. Tr. 149 and 151 (Shahat). Shahat’s failure to seek help (particularly from a trusted advisor) shows there was no Mohajeri “disrespect” or “bullying.”

In contrast, the Company's witnesses were quite credible. They testified easily and readily, providing long narrative responses to open-ended questions without having to be given or led to an answer, particularly questions asking for explanations of their actions/decisions and rationales/thought-processes. The Company witnesses responded directly to questions in a spontaneous, authentic, unrehearsed fashion (e.g., "Oh yes, this has nothing to do with the complaint," Tr. 298 (Mohajeri). The Company witnesses readily made admissions on cross-examination without evasion or asking for clarification or claiming loss of recall (e.g., Mohajeri admitting that, as senior person in "piping," he was ultimately responsible for all drawing errors, Tr. 323) or they readily acknowledged and resisted a "guess" (e.g., Deen stating "A. Again, this is speculative but—I don't know" in response to a question from Company counsel, Tr. 438, l. 11). The Company witnesses forthrightly addressed the occasional questions from the Court (e.g., Mohajeri explaining several exhibits, Tr. 338-339).²²

The substance of Shahat's testimony, and his demeanor while presenting it, make it impossible to believe him as to critical events in this case. In contrast, Mohajeri and decisionmakers Deen and Shannon testified clearly, coherently, and without emotion, showing no animus to Shahat. It is was plain whose testimony should be believed.

B. There was no credible evidence of an "instruction" or "threat" violating Section 8(a)(1).

General Counsel contends that, in a meeting sometime subsequent to Shahat's July 11, 2016 filing of his complaint with Human Resources, the engineer was instructed by Mohajeri not to discuss his complaints with other employees and was threatened by the supervisor, thereby violating Section 8(a)(1). However, there is no credible evidence to support such claims.

²² The General Counsel attempted to impeach Shannon as to an apparent inconsistency in his hearing testimony and his NLRB affidavit (taken by the General Counsel) as to the date of the decision to discharge Shahat. However, a comparison of the testimony and the affidavit, in light of Shannon's other testimony, shows there was no inconsistency. The witness said that the discharge decision was made on July 7 but the decision to execute/implement that decision was made shortly before Shahat actually was released in October. Tr. 100-101; 390 (Shannon).

As is discussed above, Shahat cannot be believed as to the supposed meeting with Mohajeri for a variety of reasons, including the inconsistency of what Shahat claims Mohajeri said at their meeting and the clear, unequivocal record of Mohajeri's long-time support of Shahat. Thus, since there was no support for Shahat's incredible testimony about his alleged conversation with Mohajeri, the "instruction" and "threat" claims must be dismissed. *See, e.g., Samsung Electronics America, Inc.*, 363 NLRB No. 105 (2016) (after discrediting an employee witness, the Board held that "Absent [the employee witness'] testimony about the September 3 conversation, there is no evidence supporting the complaint allegation that [the supervisor] instructed [the witness] not to talk to other employees about a lawsuit or potential lawsuit. As a result, we find that the General Counsel did not meet his burden of proving this allegation, and we dismiss it").

C. There was no credible evidence of "concerted activity."

There is no credible evidence that Shahat or Yazid engaged in "concerted" activity or acted for the purpose of "mutual aid or protection." Their actions were solely in their individual interests, with nothing to suggest they were acting to aid or protect other employees, that is, their communications did not look towards group action.

i. Shahat was acting for purely personal reasons and not in concert with other employees to "engage in mutual aid or protection."

Shahat did not engage in "concerted activity." Although he had conversations with co-workers which arguably could be viewed as "protected," the record evidence indicates that the engineer was always acting in his own interest and not those of others: Shahat simply was not seeking to "improve terms and conditions of employment or otherwise improve their lot as employees." *Eastex, Inc. v. NLRB*, 437 US 556, 565 (1978).²³ Further, there was no evidence that

²³ Of course, Shahat's complaint to Deen about his cubicle relocation was not "concerted" activity: the facts are clear that, and Shahat even admitted, he did not want to relocate for purely personal reasons. Tr. 141.

Shahat was speaking to co-workers in anticipation of group action rather than simply airing his gripes about what Shahat perceived was Mohajeri's "disrespect." *Mushroom*, 330 F.2d at 685.

Shahat never complained about Mohajeri's "disrespect" prior to July 11, 2016, despite having multiple opportunities to do so; in fact, he testified that Deen was surprised on that day because Shahat never previously had informed Deen of the matters discussed in Shahat's memos. Tr. 125; 149, ll. 5-11 (Shahat). And his July 11, 2016 complaint to HR, clearly focused on him and his problems, griping about how Mohajeri treated him and his sneakers and his signature on a birthday card; Shahat clearly was unconcerned with his co-worker. There is no evidence that Shahat asked other employees to support him or that he was speaking for them or that he asked them to do anything or that they asked Shahat to do anything. Most notably, in his July 11 conversation with Hester, Shahat even expressly disclaimed acting with or for others, refusing to give her the names of personnel with similar concerns or who could support his allegations, stating that he did not want to speak on behalf of other people ,and "he couldn't speak for others of the team"! Tr. 71-72 (Hester).

Any Shahat claim of "concerted activity" also is inconsistent with the observations of persons who worked with him. Deen and Mohajeri never observed Shahat indicate that he was acting on behalf of any other employee or express complaints or concerns on behalf of any other employee or their treatment by the Company, nor did it appear to Deen, Mohajeri, or Shannon that Shahat was acting other than in his own self-interest. Tr. 310; 395; 467.

Finally, there is no evidence that the Company actually knew of any "concerted activity." Shahat testified to various conversations he claims to have had with co-workers (who may or may not have shared his opinions about Mohajeri), but there was no evidence the Company had knowledge of those conversations much less any evidence that Deen, Shannon or Mohajeri acted/did not act because of them.

Simply put, there is no evidence that Shahat's activities were "concerted." To the contrary, he was at all times acting for himself and not for the purpose of inducing or furthering group action. The testimony about Shahat's conversations with his co-workers should lead to the same conclusion as was reached by a court finding that employee conversations were not "concerted" activities because "it appears from the conversations themselves that no group action of any kind is intended, contemplated, or even referred to." *Mushroom*, 330 F.2d at 685; *Deauville Hotel*, 751 F.2d at 1571 (holding that "gripping is not a protected activity," noting "[I]t must appear at the very least that it [gripping and complaining] was engaged in with the object of initiating or inducing or preparing for group action or that it had some relation to group action in the interests of the employees")(citations omitted). Shahat's conversations with co-workers were not "concerted."

ii. Yazid never engaged in concerted activity.

Yazid never complained about Mohajeri's management style during his Company employment nor did he ever indicate to the Company during his employment that Mohajeri had bullied or belittled other employees.²⁴ Tr. 467 (Deen).

Yazid had multiple opportunities to complain about Mohajeri but did not exercise them. He conceded that he had ready access to and trusted Deen, Tr. 211-212 (Yazid), and was situated close to Hester in HR, *Id.*, but Yazid never contacted them about Mohajeri. And, although the General Counsel offered a "grievance" letter from Yazid dated June 8, 2016, the engineer testified that he did not submit it at that time, Tr. 199, and the undisputed testimony of Company witness was that it was not received by the Company until attached by Yazid to his email dated July 22,

²⁴ Yazid did email Shannon and Hester after he was terminated. GC Ex. 33; Tr. 97-98 (Shannon). Shannon replied almost immediately with a "we will investigate" response because Shannon thought, mistakenly, that the email had come from Shahat in conjunction with his complaint. *Id.* The Company never responded to the substance of the Yazid email because it appeared to come from an unhappy former employee complaining only after he was dismissed, i.e., he had never complained while actually employed so the post-termination email simply was an attempt to retaliate against the Company. Tr. 369, 392. Significantly, Yazid conceded that, though he never got a response from the Company, he never thereafter attempted to contact HR about his "grievance." Tr. 214.

2016, i.e., on the day of but after his discharge. Tr. 69-70, 343-344 (Hester); 206 (Yazid). And, though Yazid sent Hester an email in June 8, 2016 requesting a meeting with her, Resp. Ex. 32, it was overlooked by Hester and was not discovered until after Yazid's termination, so there never was an actual expression of a Yazid "grievance" during his employment. Tr. 68, 343-344 (Hester). Yazid conceded during his testimony that he did not pursue a meeting with Hester when he did not receive a prompt response from her. Tr. 214 (Yazid).

Significantly, Yazid testified only that he had witnessed and occasionally been involved in conversations about supervisor Mohajeri but there was no evidence Yazid was anything other than a passive witness to employee griping, i.e., there was no evidence that he ever sought the assistance of other personnel in addressing Mohajeri's supposed conduct nor that he ever was acting on behalf of other employees or that others sought his assistance.

Again, as with Shahat, witnesses testified that they never observed Yazid indicate he was acting on behalf of any other employee or express complaints or concerns on behalf of any other employee or their treatment by the Company, nor did it appear to Deen, Mohajeri or Shannon that Yazid was acting other than in his own self-interest. Tr. 310; 395; 467.

D. There was no evidence of "causation."

The General Counsel failed to provide any evidence of "causation," that is, any connection between any supposed "concerted activity" and adverse actions affecting Shahat or Yazid.

The undisputed evidence is that Shahat did not register his complaint about Mohajeri until after the decision was made to discharge him. Shahat admitted that Deen was surprised when the engineer handed the manager the two complaint documents on July 11, Tr. 125, and Shahat admitted that prior to July 11 he never previously had informed Deen of the matters discussed in Shahat's July 11 memos. Tr. 149, ll. 5-11 (Shahat). The undisputed evidence is that Deen and Shannon made the decision to discharge Shahat on July 7 but the engineer made his complaint on

July 11, Tr. 457-458; Resp. Ex. 28, so there was not the necessary cause-and-effect sequence of events allowing any inference of retaliation. Therefore, there could NOT have been a violation of Section 8(a)(1). *See, e.g., Banner Health System*, 358 NLRB No. 93 (2012) (affirming judge's findings that a counselling for insubordination and a negative evaluation did not violate Section 8(a)(1) because they occurred before any protected activity).

The undisputed evidence shows that Shahat and Yazid had demonstrated job performance issues for many months prior to any activity that might be found to be both "concerted" and "protected." The Mohajeri timelines for Shahat (Resp. Ex. 8) and for Yazid (Resp. Ex. 2) are eloquent and irrefutable evidence of their on-going performance issues despite every Mohajeri and Deen effort to coach them to success.

Significantly, the decisions to discharge Shahat and Yazid were made by Deen and Shannon, not the only individual accused of disrespectful behavior (Mohajeri). Mohajeri agreed with the decisions, but they were made by Deen and Shannon based on their own assessments, including Deen's observations of the unsatisfactory performance for many months. Tr. 457-458.

The General Counsel may argue that "causation" is found in the Company not disciplining Shahat or Yazid for poor performance or in the Company not placing them on PIPs. However, any such assertion fails because the undisputed testimony of multiple witnesses was that, although the Company consistently and carefully addresses the poor performance of its personnel, the Company does not require discipline or a PIP before an employee can be discharged for "performance." Tr. 108-109 (Shannon); 491 (Deen).

Finally, the undisputed evidence is that the Company does not tolerate or ignore poor performance of engineers in the "piping" group and routinely discharges personnel for poor performance if coaching/counseling efforts are unsuccessful, irrespective of whether such personnel have engaged in concerted activity. There were no "piping" engineers performing as

poorly as Shahat and Yazid at the times of the discharge decisions affecting them.²⁵ Tr. 258-259 (Mohajeri); 427, 465 (Deen).

E. Shahat and Yazid would have been discharged even if there had been concerted activity.

There was extensive and largely undisputed evidence that Shahat's and Yazid's job performances were unsatisfactory over extended periods of time and, that the Company routinely discharges employees for poor performance if its coaching/counseling efforts are unsuccessful, irrespective of whether such personnel have engaged in concerted activity. Deen, Shannon and Mohajeri testified without contradiction that, given the on-going unsatisfactory performance of Shahat and Yazid, each of them would have been discharged even had there not been any complaint about Mohajeri. *See, e.g.*, Tr. 395 (Shannon); 471 (Deen).

Shahat was given multiple opportunities to improve his performance over a period of many months. He did not do so. The Mohajeri timeline for Shahat, reflecting contemporaneous notes about the engineer's performance issues, shows multiple Shahat performance issues more than a year before his July 11 complaint and even after his "bumped up" evaluation in May 2016 (accompanied by Company admonitions that he must improve). Resp. Ex. 8. The timeline confirms Deen's and Mohajeri's observations that Shahat's performance did not improve either (i) after the evaluation and before the July 7, 2016 discharge decision or (ii) after the decision but before the implementation of the discharge in October 2016. Tr. 296-297 (Mohajeri); 444 (Deen).

Significantly, Yazid did not in his testimony dispute the majority of the performance issues described in the Mohajeri timeline. Although he tried to explain the "ECN" situation, Yazid did

²⁵ The General Counsel proffered evidence about a number of employees other than Shahat and Yazid. Tr. 77-89; GC Ex. 24-32. Such information is irrelevant to any determination as to Shahat and Yazid because, as is obvious from an inspection of those exhibits, the employees were in different departments with different management decisionmakers in different situations, and there was no testimony explaining the separations of those employees or relating those employees to Shahat and Yazid and THEIR department, decisionmakers and situations. The testimony and exhibits as to such personnel should be given no weight in the ALJ's decision.

not address the numerous and various other performance issues contemporaneously documented by and testified about by Mohajeri. Tr. 236-259; Resp. Ex. 2-7. Yazid's unsatisfactory job performance is essentially undisputed and, coupled with the undisputed testimony of Company personnel that an employee would have been discharged in such circumstances, Yazid's claims must be dismissed.

CONCLUSION

General Counsel has failed to prove that Mitsubishi Hitachi Power Systems Americas, Inc. violated Section 8(a)(1) of the National Labor Relations Act in its treatment of Shahat or Yazid. The record evidence shows that Shahat and Yazid did not engage in "concerted activity" known to the Company and that the employees were treated and discharged in compliance with law. The General Counsel has not satisfied his burden of proof and, thus, the Complaint should be dismissed. *Citizens Investment Services Corp. v. NLRB*, 430 F.3d 1195 (D.C. Cir. 2005).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this January 8, 2018, a copy of this "Post-Hearing Brief" was transmitted by email to John Plympton, Esq., Counsel for the General Counsel, National Labor Relations Board Region 12, 201 E. Kennedy Blvd.—Suite 530, Tampa, FL 33602.

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